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No. 07-1434

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DIXIE NATIONAL LIFE INSURANCE COMPANY, *et al.*,

Petitioners,

v.

MARTHA WARD, Individually and on Behalf of All Others Similarly Situated,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

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INTRODUCTION

Petitioners' supplemental brief is a misguided attempt to twist the Fourth Circuit's adherence to South Carolina law into an *Erie* dilemma. Citing S.C. Code Ann. § 38-71-242 and Department of Insurance Bulletin 2008-15—both of which emerged months after the Fourth Circuit's decision—Petitioners suggest that the Court vacate the Fourth Circuit's opinion in order to "remind the Fourth Circuit—and the entire federal judiciary—that principles of federalism matter deeply . . . [and] the State's laws and interpretations of those laws must be respected." Petitioners' Supplemental Brief, pp. 7-8. Ironically, however, Petitioners are mistaken because South Carolina law itself establishes beyond doubt that Section 38-71-242 and Bulletin 2008-15 have no bearing upon this case.

Petitioners brought their request for a writ of certiorari before the Court on May 16, 2008. On June 4, 2008, the South Carolina General Assembly enacted S.C. Code Ann. § 38-71-242, which *prospectively* defines the term "actual charges" as used in insurance policies. Whereas the Fourth Circuit remanded this case to the District Court for further proceedings, Petitioners immediately moved, on the basis of this newly enacted statute, for judgment on the pleadings of this case before the District Court. The District Court denied Petitioner's motion, finding that "general retroactivity principles provide that statutes and administrative rules are applied prospectively absent clear legislative intent to the contrary . . ." and "[n]othing in either the legislative history or the language of § 38-71-242 unambiguously indicates that the statute is to be applied

retroactively to the cases currently pending, in any form." *Ward v. Dixie National Life Ins. Co., et al.*, 3:03-cv-03239-JFA, docket entry 342 (D.S.C.).

On August 28, 2008—sixteen days after the District Court's denial of Petitioner's motion—the South Carolina Department of Insurance issued the Bulletin 2008-15. In response to this Bulletin, Petitioners filed a motion to reconsider the District Court's prior ruling, a motion for partial summary judgment, a motion to amend the Petitioner's answer, and this supplemental brief—all of which were based in part upon Bulletin 2008-15.

The District Court quickly rejected the motion for reconsideration, finding "the motion presents neither new controlling law, nor new evidence, nor points out a clear legal error of this court." *Ward v. Dixie National Life Ins. Co., et al.*, 3:03-cv-03239-JFA, docket entry 358 (D.S.C.). The Petitioners' motions to amend and for partial summary judgment, however, are still pending. Most recently, the District Court suspended all briefing deadlines in this case until November 3, 2008 pending the results of mediation between the parties now scheduled to occur on October 13, 2008. *Ward v. Dixie National Life Ins. Co., et al.*, 3:03-cv-03239-JFA, docket entry 359 (D.S.C.).

ANALYSIS OF SUPPLEMENTAL MATERIAL

Petitioners' reliance upon S.C. Code Ann. § 38-71-242 and Bulletin No. 2008-15 is fundamentally flawed in the following respects: first, Petitioners seek retroactive application of the statute by ignoring its clear and unambiguous language in a manner that would render the statute constitutionally suspect; and second, the Bulletin advanced by Petitioners as authority, in fact, has no legal effect.

Furthermore, the fact that all of these arguments are now being addressed by the District Court underscores the point that this case is particularly unsuitable for certiorari.

I. Due To The Plain Language Of The Statute And Its Prospective Application, S.C. Code Ann. § 38-71-242 Has No Relevance To The Facts Of This Case

Petitioners insist that S.C. Code Ann. § 38-71-242, along with Bulletin No. 2008-15, "unequivocally repudiated the Fourth Circuit's refusal to defer to the DOI's longstanding interpretation of "actual charges". Petitioner's Supplemental Brief, pp. 4-5. However, the plain language of the statute and South Carolina's rule of prospective statutory application render Section 38-71-242 inapplicable to the case at hand.

The pertinent statutory provision Petitioners rely upon reads as follows:

> Notwithstanding any other provision of law, **after the effective date of this section**, an insurer or issuer of any individual or group specified disease insurance policy shall not pay any claim or benefits based upon an actual charge, actual charges, actual fee, or actual fees under the applicable policy in an amount in excess of the 'actual charge', 'actual charges', 'actual fee', or 'actual fees' as defined by this section.

S.C. Code Ann. § 38-71-242(C) (emphasis supplied).

The South Carolina Supreme Court has observed that

> [i]t is a cardinal rule of statutory construction that the primary purpose in interpreting statutes is to ascertain the intent of the Legislature. . . . When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.

Sloan v. South Carolina Bd. of Physical Therapy, 636 S.E.2d 598, 606 (S.C. 2006).

Petitioners' claim that Section 38-71-242 "repudiates the Fourth Circuit's refusal to defer to DOI's longstanding interpretation of 'actual charges'" rests upon the presumption that the statute retroactively applies to insurance contracts formed years ago. Under South Carolina's rules of statutory construction, however, effect must be given to the clear language of the clause in subsection (C) limiting the statute's scope to policies issued "after the effective date of this section" (here, June 4, 2008). Section 38-71-242 contains no language expressing any intent to abrogate vested rights on pre-existing private contractual obligations, to abate actions pending on those rights, or to nullify a federal appellate court mandate. As such, Petitioners' proposed construction stretches far beyond the plain language of the Act in derogation of the rules set forth in *Sloan*.

Furthermore, Petitioners' attempt to retroactively apply the terms of Section 38-71-242 violates fundamental precepts of the interpretation of South Carolina statutes. As explained by the South Carolina Supreme Court:

> A statute that becomes effective after the date of issuance of an insurance policy does not apply to that policy absent legislative intent that the statute be applied retroactively.
>
> A statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt. The statute must contain express words evincing an intent that

> it be retroactive or words necessarily implying such an intent.

American Nat'l Fire Ins. Co. v. Smith Grading and Paving, Inc., 454 S.E.2d 897, 899 (S.C. 1995) (internal citations omitted). Section 38-71-242 contains no such "express words" and thus must be read to apply prospectively only.

Reading Section 38-71-242, as Petitioners insist, to apply retroactively would be constitutionally suspect. Both the United States and South Carolina constitutions prohibit legislative impairment of contractual rights. Although the Contract Clause does not forbid minimal alterations of contract obligations, "[s]evere impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978) (footnote omitted).[1] In Petitioners' own words, their interpretation of Section 38-71-242 prohibits "paying claims or benefits . . . unless a court has issued a final judgment as of June 4, 2008." Petitioners' Supplemental Brief, p. 6. Depriving policyholders of millions of dollars in accrued and owing benefits is a severe impairment under any test.

The law is well-settled that statutes should be read to avoid interpretations that place their constitutionality

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1. Article I, § 4 of the South Carolina Constitution is functionally identical to its federal counterpart. "In interpreting the Contract Clause of the South Carolina Constitution, this Court has followed federal precedent construing the federal Contract Clause." *Alston v. City of Camden*, 471 S.E.2d 174, 176 (S.C. 1996).

in doubt. "Constitutional constructions of statutes are not only judicially preferred, they are mandated; a possible constitutional construction must prevail over an unconstitutional interpretation." *Henderson v. Evans*, 232 S.E.2d 331, 333 (S.C. 1977) (string citation omitted). Federal courts, of course, apply the same rule of statutory construction:

> [W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoid, our duty is to adopt the latter.

United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909). Applying this fundamental rule of statutory construction, Section 38-71-242 must be construed to apply only to insurance policies issued after the effective date of the act. Interpreting the statute otherwise would be to threaten its validity.

The law is clear that Section 38-71-242 applies prospectively to contracts entered after its passage and does not apply to the pre-existing contracts at issue in this case. Consequently, the statute does not prohibit the payment of damages sustained by the Plaintiff class due to the Petitioners' breach of the contracts at issue and does not "repudiate" the Fourth Circuit's holding.

II. Because Bulletin 2008-15 Goes Beyond The Language Of Section 38-71-242 And South Carolina Courts Grant Such Bulletins No Authority, The Department Of Insurance Interpretive Bulletin Has No Relevance To The Facts Of This Case

As shown above, the proper, prospective application of Section 38-71-242 renders the recently enacted statute inapplicable to this case. Necessarily, Bulletin 2008-15—which purports to interpret this statute—is also irrelevant. However, there are three additional reasons why this Bulletin should not affect the Court's decision as to the pending petition: first, Petitioners' construction of the Bulletin goes far beyond its own language; second, the Bulletin itself ignores the plain language of Section 38-71-242; and third, South Carolina courts have expressly found interpretive bulletins from the Department of Insurance to be non-binding.

Before addressing the legal efficacy of the interpretive bulletin, it is important to note that Petitioners' declaration of the bulletin's significance goes far beyond the plain language within its body. Petitioners assert that "the South Carolina legislature has expressly granted the DOI . . . interpretive authority over insurance contracts . . ." and "Bulletin 2008-15, together with Section 38-71-242, attempts to reclaim the DOI's regulatory and interpretive authority over insurance contracts." Petitioners' Supplemental Brief, p. 5. There are two major flaws with this assertion. First, no where within the South Carolina Code does the legislature grant the DOI—a regulatory agency—the power to interpret contracts. Second, no where within the body of the Bulletin does the Department purport

to "reclaim" any type of "interpretive authority" whatsoever. The specter of the Department of Insurance's ability to adjudicate contractual disputes is a creation of the Petitioners. Their utilization of the Bulletin to attack the lower court's ruling is premised upon the notion that "the Fourth Circuit's refusal to defer to the DOI would take that authority away." Petitioners' Supplemental Brief, p. 5. Ironically, this "authority" to interpret contracts is a notion to which even the DOI fails to subscribe.

Although the Department of Insurance does not profess to have the authority to interpret contractual provisions within Bulletin 2008-15, it does attempt to extend its regulatory authority well beyond the bounds set forth within Section 38-71-242. Notably, the Bulletin establishes the following mandate:

> Unless expressly required to do so by a final judgment issued before June 4, 2008 by a court of competent jurisdiction, insures (sic) that have issued supplemental cancer policies or other specified disease policy in this state containing the term(s) "actual charge," "actual charges," "actual fee," or "actual fees" and that do not contain an express definition of those terms may not pay any claim or any benefit in excess of the amount specified in S.C. Code Ann. § 38-71-242.

Petitioners' Supplemental Brief, pp. 4a-5a.

This is a remarkable restriction upon South Carolina insurers as its directive is not supported by the clear and unambiguous language of Section 38-71-242. Though South Carolina courts may afford agencies deference in the interpretation of statutes they administer, "where, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation." *Brown v. Bi-Lo, Inc.*, 581 S.E.2d 836, 838 (S.C. 2003).

Even though agency interpretations are often discarded by South Carolina courts, Petitioners insist that Bulletin 2008-15 is "authoritative guidance as to how the term 'actual charges' has been, and will be, interpreted . . .". Petitioners' Supplemental Brief, p. 5. However, the South Carolina Supreme Court has specifically declared that "[a]n interpretive Bulletin [issued by the Department of Insurance] is not binding on the courts." *Garris v. Cincinnati Ins. Co.*, 311 S.E.2d 723, 726 (S.C. 1984), *rev'd on other grounds*. *Garris* involved a similar case in that the dispute centered upon the litigants' contrary interpretations of an insurance statute. The appellant insurance company based its interpretation upon a bulletin issued by the Department of Insurance. The *Garris* court refused to defer to the Department's bulletin, instead opting to observe the "clear and unambiguous" statutory language standard set forth in *Sloan*, *supra* and other cases. *Garris* at 725.

Just as in *Garris*, the interpretive bulletin authored by the Department of Insurance is not binding upon the Courts in this case. Furthermore, the directive within Bulletin 2008-15 goes far beyond the plain language of the statute it attempts to interpret. Finally, even the

non-binding language of Bulletin 2008-15 does not stretch to the point—as Petitioners insist—of "reclaiming" the Department's non-existent "interpretive authority" over insurance contracts. As such, Bulletin 2008-15 has no bearing on this case and should not affect this Court's certiorari analysis.

III. The Fourth Circuit's Careful Adherence To State Law And The Interlocutory Nature Of This Petition Renders This Case Unworthy Of Certiorari And A GVR Order Is Inappropriate

Petitioners attempt to craft a "certworthiness" argument by inventing a conflict between the Fourth Circuit's ruling and South Carolina law. Ironically, as shown above, Petitioners' appeal to a recently enacted statute and authored interpretive bulletin itself runs afoul of the South Carolina law they claim to protect.

Similarly, Petitioners' request for a GVR is also misplaced. This Court has found GVR's to be appropriate in the following situations.

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Lawrence on Behalf of Lawrence v. Chater, 516 U.S. 163, 167 (1996).

Petitioners insist that the "intervening development" justifying a GVR is the DOI's interpretive Bulletin 2008-15. But as the Fourth Circuit's opinion demonstrates, it has already fully considered the position of the Department of Insurance and has declined to follow that position in accordance with South Carolina law. Petitioners' Brief, p. 12a n.3. Similarly, the above discussion of South Carolina law as it applies to the recently enacted Section 38-71-242 and Bulletin 2008-15 reveals that there is no reasonable probability the Fourth Circuit will alter their previous decision based upon this supplemental authority.

Finally, the interlocutory nature of this petition and the litigation now pending before the District Court weigh in favor of the petition's denial. Ordinarily, this Court does not grant certiorari in such cases "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the case.'" Robert L. Stern, et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002) (quoting *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) (emphasis added)); *see also, e.g., Hamilton Brown Shoe Co. v. Wolf Bros. Co.*, 240 U.S. 251, 258 (1916) (interlocutory decisions are reviewed only "in extraordinary cases"). Not only do such extraordinary circumstances not exist, but the District Court is currently considering the exact issues that have been presented to this Court as justification for interlocutory certiorari. If, in fact, Petitioners are correct that the Fourth Circuit will reverse its prior decision in light of Section 38-71-242 and Bulletin 2008-15, it will have ample opportunity to do so on appeal from the District Court. Furthermore, it bears repeating that this case has been scheduled for mediation on October 13, 2008 and thus may be amicably resolved within a matter of weeks.

CONCLUSION

This petition for certiorari should be denied because its fundamental premise—the presence of *Erie* concerns within the Fourth Circuit's opinion—simply does not exist. Petitioners have submitted S.C. Code Ann. § 38-71-242 and Bulletin 2008-15 as supplemental authority that they insist underscores the conflict between the Fourth Circuit and State authority. As shown above, however, South Carolina law demonstrates that both the newly-enacted statute and the bulletin have no bearing upon this case. Furthermore, the fact that this case is still pending in the District Court—and these exact issues are being argued—underscores the impropriety of certiorari in this instance.

For these reasons and those outlined in her Reply Brief, Respondent Martha Ward respectfully requests the Court deny the petition for writ of certiorari.

Respectfully submitted,

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